Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

WILLIAM KUCHINSKAS, *et al.*,

Petitioners,

v.

BROWARD COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Too little. Too late. The County's half-hearted, temporary, attempts at "correction" after it was sued could not put the genie of liability back in the bottle. Neither the DOL, nor any other circuit court of appeals would have allowed the County to escape all liability for recurring violations made pursuant to its express rules – especially where the violations continued after notice from its own attorneys that it was illegal to deny payment for overtime wages while docking pay for tardiness. The County was neither plainly and unmistakably entitled to the exemption, nor to the forgiveness of the window of correction.

The Court should grant the instant petition to resolve the circuit conflict regarding the interpretation of the salary basis test – including its window of correction – and to address the Eleventh Circuit's misapplication of the burdens of proof in FLSA actions which affects millions of workers nationally.

ARGUMENT

I. The Court Should Grant The Petition To Resolve The Conflict Among The Circuits With Respect To The Salary Basis Test

A. The Window of Correction. The County claims the interpretation of the window is not at issue in *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996). (Opp. 11). The County apparently overlooked pp. (v), (vi), 15-17 of the *Auer* Petition, titled: "Window of Correction: 'Inadvertent' or 'For Reasons Other Than Lack of Work' – Conjunctive or Disjunctive". The *Auer*

petition also expressly cited the Eleventh Circuit's conflict with the other circuits on the interpretation of the window. (*See* Exhibit to *Auer* petition). *See also* Supreme Court Rules 14.1(a) (questions presented in petition are deemed to comprise every subsidiary question fairly included in them); and 24.1(a) (Court may consider questions evident from the record).

The *Auer* petition was granted to address the interpretation of the salary basis test, including the window of correction. Moreover, certain issues related to the window are exactly the same: employer's failure to correct all impermissible rules, and failure to repay all money docked. The instant petition also presents the opportunity to resolve additional salary basis issues and conflicts: whether the window may be used to absolve willful violations; whether it is a valid regulation if read disjunctively; whether public employers are required to comply with the earlier version of the salary basis test if they are able. On this last issue, the Tenth Circuit answers "yes". The Eleventh Circuit answered "no". *See Spradling v. City of Tulsa*, 95 F.3d 1492, 1498-1499 (10th Cir. 1996) (pre-1991 salary basis test is valid and enforceable with respect to public sector employers unable to prove they were prevented from complying).

The County's reliance on *Martin v. W.E. Monks*, 1993 WL 300332 (6th Cir. 1993) is misplaced.[1] While the *Monks*

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[1] The County claims *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990) is no longer good law after *SEIU*, 60 F.3d 1346 (9th Cir. 1995). This is not so. *See McGuire v. City of Portland*, 91 F.3d 1293, 1295 (9th Cir. 1996) citing *Abshire* as precedent and limiting *SEIU; Hackett v. Lane County*, 91 F.3d 1289, 1291 (9th Cir. 1996) citing *Abshire* as precedent. The County's argument that *Balgowan* be ignored is misplaced. *Balgowan v. New Jersey*, 84

court read the window disjunctively, it nonetheless held the window was not available because the employer had engaged in multiple instances of docking and therefore there was no preservable exemption to restore through the window. *Monks* actually conflicts with *Kuchinskas*.

Docking Was Not Inadvertent. Docking is never inadvertent if it is in willful violation of the FLSA. An employer willfully violates the FLSA if it either knows or is in reckless disregard for the matter of whether its conduct is prohibited by the FLSA. *McLaughlin v. Richland Shoe*, 486 U.S. 128, 133 (1988).

The record here is replete with evidence that the County was in willful violation. After all, before this lawsuit was filed, Rosenberg warned of increasing the County's "ultimate liability" if it did not change its policies and practices, and the County's in-house counsel agreed. Yet, no changes were made. Furthermore, even after it was sued, the County never changed its disciplinary docking rules to prevent overtime-exempt employees from losing pay for minor infractions. As a matter of law these are willful violations.

It also claims docking was inadvertent because in a three-year period, it actually docked only an alleged 3.65% of its job basis employees for prohibited reasons. This ignores the focus and purpose of the salary basis test. It is a test of the employment relationship. The focus under the regulation is on the "employment agreement"

F.3d 656, *vacated on other grounds*, 3 WH Cas.2d 672 (3rd Cir. 1996), is the Third Circuit's opinion on the interpretation of the salary basis test and indicates its conflict with the Eleventh Circuit. It was vacated and rehearing granted on an issue unrelated to its decision on the regulation.

and whether under it, the purported executive is "subject to" reduction in pay. 29 C.F.R. § 541.118(a). The focus is not on how many, or whether, purported executives ever broke minor work rules. Indeed, evidence of actual impermissible docking merely proves, *indisputably*, that those similarly situated were "subject to" the real possibility of docking.

Docking Was Not The Result Of "Confusion". There was no "confusion" on the County's part, just a conscious decision to ignore the law for the majority of its job basis employees. First, there is no "confusion" defense in the statute or regulation. *See* 29 U.S.C. § 259(a). Indeed, a "confusion" defense was rejected in *Kinney v. District of Columbia*, 994 F.2d 6, 12-13 (D.C. Cir. 1993).

Second, case law on the salary basis test in the public sector began as early as 1987 and the law was well-settled enough by 1990 that it was cited as the state of the law that employees exempted from overtime wages should not be subject to docking, even if no actual docking takes place. *See* 64 Fla.B.J. 54, 55 (November 1990) "Many Florida Public Employers Ignore FLSA Compliance"; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992) (collecting cases). Moreover, no court has ever held it permissible to dock executives for minor infractions.

If Rosenberg were as avid a reader and as experienced as the County would have us believe, he could not have missed it. Indeed, he admitted he knew when he arrived at the County in 1989, that the County's rules and regulations did not comply with the salary basis test. Further, he knew about *Abshire* and *Atlanta Firefighters*, 920 F.2d 800 (11th Cir. 1991) and knew it was in-house

counsel's opinion the County was in violation. Yet, compliance with the salary basis test was limited only to those Director Rosenberg deemed "higher-level administrators and professionals", such as himself. No confusion, just a choice.

B. Conflict Over Actual Versus Theoretical Docking. The County concedes the circuit conflict on whether evidence of actual – as opposed to theoretical – docking is necessary for loss of exemption under the salary basis test. It claims, however, that the Eleventh Circuit conflict is not at issue here because the Eleventh Circuit did not discuss it in this case. This is not so.

But for the Eleventh Circuit's requirement of evidence of actual docking – which conflicts with the majority of circuits – it would never have reached the window. In the majority of circuits – as in the regulation itself (29 C.F.R. § 541.118(a) – the focus is on the "employment agreement". The majority looks to the employment agreement to see if the purported executive was "subject to" docking for impermissible reasons. In other words, whether under the employment agreement there was a real (not a mere) possibility that the alleged executive could have been docked. If yes, then the inquiry stops and the window of correction is not open for discussion. *See, e.g., Spradling v. City of Tulsa*, 95 F.3d 1492, 1503-1504 (10th Cir. 1996) (window does not apply if there is a settled policy of docking).

The fact the Eleventh Circuit resorted to the window at all, and the fact that it denied relief even to those who were subject to docking but not actually docked and not reimbursed, is a direct result of its conflict with the majority of circuits on this issue. This conflict is therefore

squarely presented here and was expressly raised in the trial and appellate courts.

The County claims the Court should deny review since this case has only limited impact because of the DOL's modification of the salary basis test in the public sector, 29 C.F.R. § 541.5d. By its very terms, however, this modification only applies to partial day absences – not to disciplinary docking – and only applies to public sector employers that are prevented or prohibited from complying with the earlier version.

The County here was not prevented from complying with the earlier version. Indeed, it complied with that version for those it deemed its "higher level administrators and professionals", allowing them partial day absences without the requirement of charging leave banks or being subjected to loss of pay, and without the requirement that they complete time sheets.

If the County was able to comply with the earlier version for *some* of its overtime exempt employees, it should comply with that version for *all* employees to whom it denies payment for overtime hours. *See Spradling v. City of Tulsa*, 95 F.3d 1492, 1498-1499 (10th Cir. 1996) (under § 541.5d, public sector employer has burden of proving it was prevented from complying with earlier version of the salary basis test before it may benefit from the "relaxed" standard, and if it cannot meet this burden, it must comply with the earlier version, since those employers like private sector employers, "were perfectly capable of structuring their pay systems to comply with all aspects of the DOL's salary test").

The *Spradling* view comports with that of the DOL. *See* 57 Fed.Reg. 37,666 at 37,675 and 37,676 (August 1992) ("If a deduction from pay (or the decision not to deduct) is based purely on the employer's discretionary choice, compensation would be 'subject to deduction' for a reason other than that specified in the IFR [codified at 29 C.F.R. § 541.5d]"). Since § 541.5d does not apply to all public sector employers, this case has wide-ranging implications and is ripe for review by this Court.

The County attempts to disclaim responsibility for practices that occurred throughout the years, throughout its departments – practices specifically authorized and mandated by its written rules and regulations and reviewed and distributed by its centralized Personnel Division. It cannot avoid the consequences of the overtime violations that occurred. *See Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076, 1083, 1084 (11th Cir. 1994) (even if some were in compliance, it was error as a matter of law not to impute knowledge of overtime violations to the employer if the employer could have acquired actual knowledge "through the exercise of reasonable diligence").

The County complains, "Plaintiffs presented no evidence to prove the cause of any of these payroll errors." (Opp. p. 6). First, the County representative testified the docking was *not* a result of computer or clerical error, and was made even though leave was available. Second, the exact reasons for the docking that took place was always within the knowledge and control of the County. Third, the County bore the burden of proving the exact cause of the pay-docking if it intended to rely on it as the basis for claiming it was entitled to the exemption. In sum, we can

be sure that if the reasons had been permissible under the regulations – including those under 29 C.F.R. § 541.5d – those reasons would have been trumpeted loudly and repeatedly by the County.

Lastly, it bears noting that although there is much discussion of pay-docking for "partial day absences", if an employee is suspended without pay for four hours for violating a minor work rule, it may also be said her pay was docked for a "partial day absence". It is also the case that an employee who was late to work by ten minutes, but who was docked an hour's pay because of it, was punished for his "tardiness", a minor infraction.

II. The Court Should Grant The Petition To Address The Eleventh Circuit's Misapplication Of The Burdens Of Proof In FLSA Actions And Its Conflict With Precedent Of This Court

A. The Job Duties Test. Absent a written stipulation from plaintiffs that the job duties prong of the two-part test for exemption was met, binding precedent of this Court required that the County submit evidence proving that it met that test. The Eleventh Circuit grossly misapplied the burden of proof in an area of law applicable to millions of workers nationally, and where the employer's proof must be plain and unmistakable. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 394 n. 11 (1960) (employee need only show the nature of his employment brings him within coverage of the FLSA; exemption drawn into the litigation only if employer seeks exemption from that coverage, and then the employer has the burden of proving its eligibility for exemption). Mere

self-serving conclusory statements in an opening statement and pretrial memorandum of law (later expressly contradicted by plaintiffs, Pet.App. 57-58) could not discharge that heavy burden. This Court should review the Eleventh Circuit's decision to do so.

B. The Motion for Sanctions. The County claims the "pertinent point was advice was obtained, not from whom it was obtained", that it was a mere discrepancy not intended to mislead. From whom the advice was obtained prior to the lawsuit made all the difference in the world. First, the advice from in-house counsel prior to this lawsuit was the County was in *violation* of the FLSA and subject to "liability". The County would obviously not have offered this "advice" as part of its *defense*. Rather, it intentionally created the false impression that attorneys from its outside labor law firm participated in a "full-scale", post-Abshire-pre-lawsuit, review of the County's rules and regulations.

Second, if it had merely been an immaterial and innocent oversight, attorneys for the County would have jumped at the chance to "set the record straight" when counsel for plaintiffs – prior to filing the motion for sanctions – wrote to them and asked that they correct the record. Yet, they refused. Pet.App. 74.

Attorneys for the County should not have been named as appellees. The cases cited by the County dealt with situations where the individual attorney was appealing a judgment *imposing* sanctions against him, and his client may not have had an interest in having that judgment reversed. Here, the Employees asked only that the false facts be stricken from the appellate record and that

the issue be *remanded* to the district court for an explanation and further review of its summary denial of their motion for sanctions. There the County and its attorneys would have had all the due process to which they were entitled.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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